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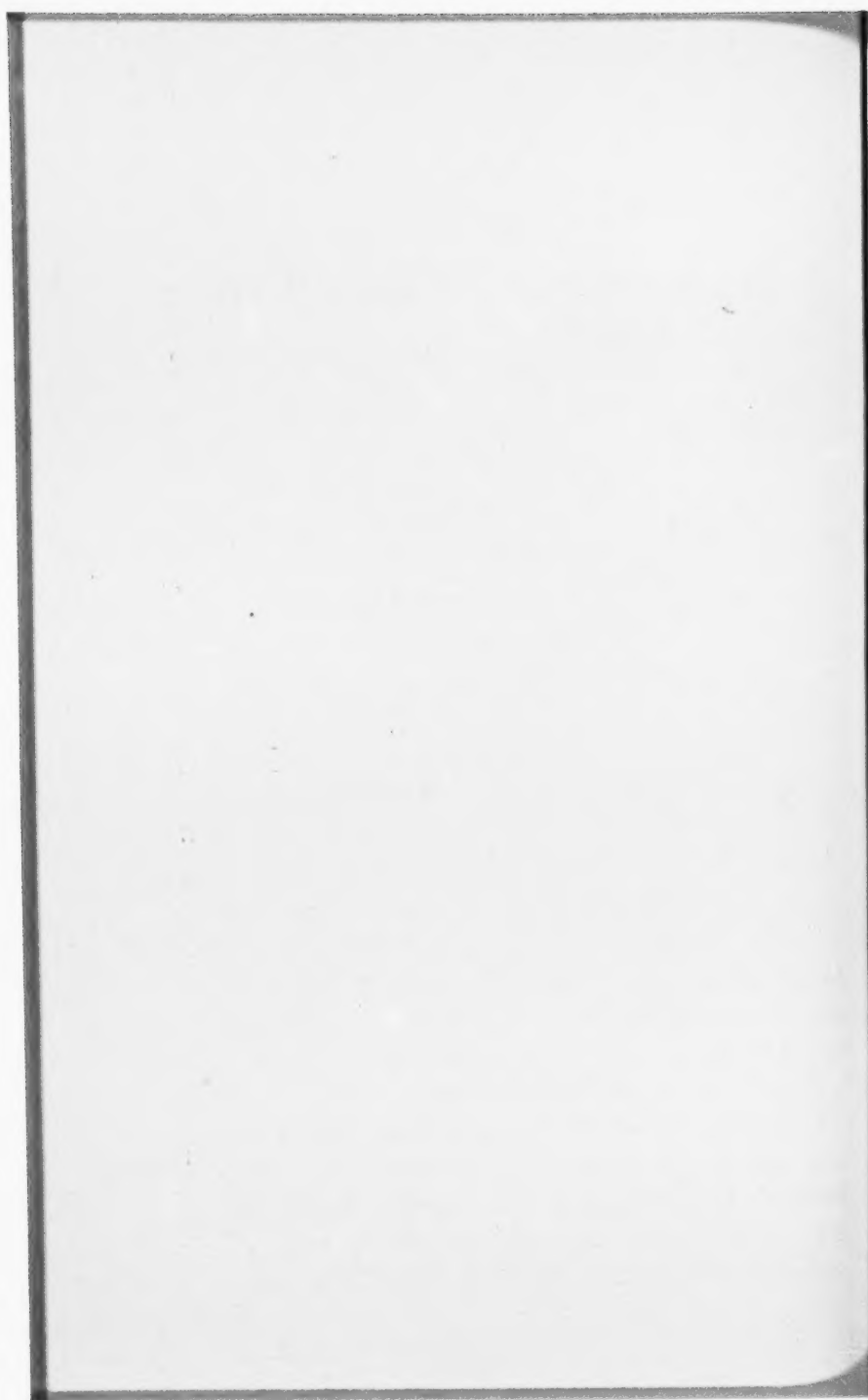
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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 97

FLETCHER TRUST COMPANY, TRUSTEES AND
TRANSFEREES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of The Tax Court of the United States (R. 67-75) are reported in 1 T. C. 798. The opinion of the Circuit Court of Appeals (R. 95-102) is reported in 141 F. 2d 36.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 17, 1944. (R. 103.) Petition for rehearing was denied March 23, 1944. (R. 106.) The petition for a writ of certiorari was filed on May 23, 1944. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the surrender by a donor in 1936 of a power to change the beneficiaries of a trust created in 1932, and the terms under which they might take, constituted a taxable gift in 1936, within the meaning of Section 501 of the Revenue Act of 1932.

2. Whether the trustee under the trust is a fiduciary liable as transferee for the gift tax due on the transfer, within the meaning of Section 527 of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 11-25.

STATEMENT

The facts as stipulated (R. 23-62) and as found by the Tax Court (R. 68-71) may be summarized as follows:

Hugh McK. Landon is an American citizen and a resident of Indianapolis, Indiana. He filed a federal gift tax return for the year 1936 with the Collector of Internal Revenue at Indianapolis, Indiana. The Fletcher Trust Company is an Indiana corporation, with its principal place of business in Indianapolis. It conducts a general banking and trust business. (R. 68.)

On May 23, 1932, Landon, as donor (hereinafter referred to at times as "donor"), and Fletcher Trust Company, as trustee (hereinafter referred to as "trustee"), entered into and executed a written trust agreement whereby Landon irrevocably assigned, transferred, and set over unto the trustee certain policies of insurance theretofore issued on his life. Among other provisions, the trust agreement provided that the donor reserved to himself the right to change any of the beneficiaries named therein or the terms under which any beneficiary might take, except that the donor could not himself become a beneficiary. (R. 68.)

The trust agreement was amended by the donor by amendments dated September 7, 1935, September 18, 1935, and July 18, 1936, all of which amendments were accepted by the trustee. By the third amendment, dated July 18, 1936, the donor irrevocably canceled and surrendered his right to change any of the beneficiaries or any of the terms under which any beneficiary was to receive his share. (R. 68-69.)

In a gift tax return for 1936, filed March 15, 1937, the donor recited the facts concerning the trust instrument of May 23, 1932, and outlined the terms of the amendment of July 18, 1936, described above, but reported no amount as taxable gifts during the year. On June 4 and June 7, 1937, the donor filed with the Collector of In-

ternal Revenue statements from the life insurance companies which had issued the above policies of life insurance showing the interpolated or gift tax values of the policies as of July 18, 1936. The values so shown for the four policies involved totaled \$99,709.06. (R. 69.)

On June 4, 1937, the trustee filed with the Collector of Internal Revenue for the District of Indiana a "Donee's or Trustee's Information Return of Gifts" for the year 1936, disclosing information similar to that appearing on the gift tax return previously filed by the donor. No gift tax was paid by either the donor or the trustee in respect of 1936 gifts by the donor. (R. 69.)

On January 18, 1941, the Commissioner mailed to the trustee a notice of determination of deficiency against it as transferee for a gift tax on 1936 gifts made by the donor. The Commissioner at no time mailed a notice of such deficiency to the donor. (R. 70-71.)

The Commissioner ruled that the relinquishment of the power to change the beneficiaries and the terms under which they might take constituted a taxable gift in 1936 and that the trustee was liable as transferee for the gift tax resulting therefrom (R. 58-62). The Tax Court sustained the Commissioner (R. 71, 74), and on appeal by the trustee the court below affirmed the decision of the Tax Court (R. 102).

ARGUMENT

The court below decided correctly the two questions involved in the trustee's application for a writ of certiorari and there is no occasion for further review. The questions are whether the surrender by the donor in 1936 of his power to change the beneficiaries and alter their interests was a taxable gift and whether the gift tax liability can be collected from the trustee.

1. The first question is controlled by the decisions of this Court in *Estate of Sanford v. Commissioner*, 308 U. S. 39, and *Rasquin v. Humphreys*, 308 U. S. 54, which were followed by the court below (R. 97). The court also applied *Higgins v. Commissioner*, 129 F. 2d 237 (C. C. A. 1st), certiorari denied, 317 U. S. 658 (R. 97). These decisions establish that a gift in trust is incomplete if power is reserved in the donor to change the beneficiaries or otherwise alter the disposition of the property, although not to the donor's benefit, and that only upon relinquishment of the power does the transfer become subject to the gift tax. Accordingly, not until 1936, when the donor relinquished his power to change the beneficiaries and to alter their interests did the gift here involved become taxable.

(a) The court below did not err in refusing to apply Article 3 of Treasury Regulations 79, as promulgated in 1936 (Appendix, *infra*, pp. 21-22). Those regulations, until amended in 1940 to con-

form to the decisions in the *Sanford* and *Humphreys* cases (Appendix, *infra*, pp. 18-21), provided that a transfer is complete for purposes of the gift tax unless the donor reserves the power to cause the beneficial title to be revested in himself. However, this Court held in the *Humphreys* case that whatever validity the regulations might have had prospectively, they were so plainly in conflict with the statute as to preclude them from being applied retroactively to the transfer made by the creation in 1934 of the trust there involved (308 U. S. 54, 56). Similarly, they may not be applied to the transfers effected in 1932 by the creation of the trust in the present case. It follows under this Court's decisions in both the *Sanford* and *Humphreys* cases that the transfer became taxable in 1936 and that this result would be required without regard to the 1940 amendments to the regulations.

(b) Section 502 of the Revenue Act of 1943 (Appendix, *infra*, pp. 16-17) has no possible application to the facts in this case. That section is clearly limited in its application to releases of powers effectuated on or after January 1, 1939. The release in this case took place in 1936. Neither is the taxpayer entitled to demand relief under Section 3791 (b) of the Internal Revenue Code (Appendix, *infra*, pp. 17-18), which gives the Commissioner a purely discretionary power to determine the extent, *if any*, to which any ruling, regu-

lation, or Treasury Decision shall be applied without retroactive effect.

2. The second question, as to whether the gift tax deficiency can be collected from the trustee, is controlled by plain and unambiguous statutory provisions.

(a) If the gift tax is not paid by the donor, the statute contains provisions for collecting the tax from other persons. (See *Phillips v. Commissioner*, 283 U. S. 589.) The tax is made a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made, and if the tax is not paid when due the donee of any gift is made personally liable for the tax to the extent of the value of the gift (Sec. 510, Revenue Act of 1932,¹ Appendix, *infra*, p. 11). Section 526 (Appendix, *infra*, pp. 13-15) provides that, generally, the procedure for assessing and collecting the tax from other persons shall be the same as that prescribed for the donor in Section 513 (Appendix, *infra*, pp. 12-13). This procedure is specifically made applicable by Section 526 (a) (1) to the liability of a transferee of property of a donor. "Transferee" is defined in Section 526 (f) as including a donee.² Section 526 (b) (1) provides that the period of limitation

¹ Subsequent references are to sections of the Revenue Act of 1932, unless otherwise indicated.

² The beneficiaries of a gift in trust are the donees. *Helvering v. Hutchings*, 312 U. S. 393; *United States v. Pelzer*, 312 U. S. 399.

for assessment of the liability of a transferee shall extend for a year after the expiration of the period of limitation for assessment against the donor.

Section 526 (g), in conjunction with Section 527 (b) (Appendix, *infra*, pp. 14-15) prescribes the means whereby the Commissioner shall be notified that any person is acting in a fiduciary capacity for a transferee, in order that the fiduciary shall assume, on behalf of the transferee, the powers, rights, duties and privileges of the latter, including liability to receive the notice of deficiency which sets the assessment and collection procedure in operation. The notice of fiduciary relationship is to be given to the Commissioner in accordance with regulations prescribed by him (Sec. 527 (c), Appendix, *infra*, p. 15). The regulations prescribed pursuant to the authority so granted (Treasury Regulations 79, Art. 61, Appendix, *infra*, pp. 23-25) do not require that the notice be given on any particular form, although it is to be in writing, signed by the fiduciary, and filed with the Commissioner.³ Section 1111 (Appendix, *infra*, pp. 15-16) defines the term "fiduciary"

³ The regulation involved in *Commissioner v. Lane-Wells Co.*, 321 U. S. 219, was of a wholly different nature and that case is readily distinguishable. *Tooley v. Commissioner*, 121 F. 2d 350 (C. C. A. 9th), and *Sanborn v. Helvering*, 108 F. 2d 311 (C. C. A. 8th), also do not apply because in those cases the fiduciaries took no action in conformity with the regulations.

as meaning, among others, a trustee or any person acting in any fiduciary capacity. As the court below held (R. 102), petitioner's information return of June 4, 1937 (*supra*, p. 4) advised the Collector and the Commissioner that it stood in such a relationship to the donee and effectively fulfilled the purpose of the required notice to the Commissioner.

(b) The whole scheme of the statute for effecting the collection of a donor's gift tax liability from a transferee is clearly and unambiguously expressed in the sections of the statute referred to above. The Tax Court of the United States and the Circuit Court of Appeals considered the arguments now advanced by the trustee in its petition for a writ of certiorari and held, in well reasoned opinions, that the statutory transferee proceedings are available to the Commissioner against this trustee. It is not necessary to repeat what the courts below said in reply to the trustee's arguments. Suffice it to say that the interpretations of the statute contended for in the courts below were contrary to the plain meaning of the statutory language. Furthermore, unless the courts below had interpreted the statute in accordance with its clear meaning, it would have meant that, in cases such as the present one, the Commissioner would be wholly prevented from resorting to transferee proceedings to collect the gift tax from the trustee. Such a result would

disrupt the collection procedure and would render the statute ineffective in a large area in which it should clearly apply.

CONCLUSION

The decision of the lower court is correct and does not present a conflict. There is no question involved which warrants consideration by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1944.

